

**Working Draft – for discussion purposes only.**  
**Lender Liability Subcommittee Meeting April 6, 2017**  
**Substantive Topics for Further Clarification/Evaluation**

Issue	Notes	Status
<p>What is meant by “acquire title to or possession or control” in the context of Wis. Stat. § 292.21(1)(c)1.?</p>	<p>Example - lender does not acquire title to real property (does not foreclose) but through enforcement of its security interest possesses or controls property (<i>e.g.</i>, lender leases space)</p> <p>Is possession and control triggered by pre-foreclosure acts? To what extent does a lender need to be involved in a property sale before the involvement becomes “possess or control”?</p>	<p>Ongoing</p>
<p>Does “operating” negate the exemptions under Wis. Stat. § 292.21? <i>See e.g.</i>, Wis. Stat. § 292.21(1)(c)1.a. and e. and § 292.21(1)(d)4.</p>	<p>Discussion was held on the distinctions imposed under the acquisition of real property provisions concerning existing discharges (releases that occur prior to the date when the lender took title to the real property as documented by following the pre-acquisition and acquisition of real property provisions) and new discharges in the real property acquisition provisions and with respect to the personal property provisions. <i>See</i> Wis. Stat. § 292.21(1)(c)1.a. (Lender is not liable for discharges on real property if lender does not intentionally or negligently cause new discharge or exacerbate</p>	<p>Should the distinctions between operations in the acquisition of real property provisions and the personal property provisions be clarified in DNR guidance and are lenders aware of the distinction?</p> <p>Should clarification be provided that a lender can appear to operate under the acquisition of real property provisions without automatically triggering liability for releases that occurred prior to the date of taking title, but liability would appear to be triggered by operations for new releases that occur after taking title or possession or control or if DNR has not</p>

	<p>existing discharge) and Wis. Stat. § 292.21(1)(c)1.e. (for hazardous substances released after the date the lender acquires title or possession or control, the lender is not engaged in the operation of a business at the property, completion of work in progress or other actions associated with conducting the conclusion of the borrower's business.)</p> <p>Also discussed that the personal property provisions in Wis. Stat. § 292.21(1)(d)4. require DNR to approve of operations in the context of activities undertaken to protect the property in the context of personal property provisions for purposes of obtaining/maintaining the exemption.</p> <p>One practical concern noted was that groundwater sampling is not required for the pre-acquisition and acquisition inspections and, thus, there may be situations where it may be unknown whether a release occurred before or after taking title.</p>	<p>approved of the operations undertaken to protect the property for purposes of the personal property provisions?</p> <p>Specific area of concern raised– lenders foreclosing and then leasing out property (<i>e.g.</i>, strip malls)</p>
Is clarification needed of when a lender acquires title to real property for purposes of the exemption's acquisition provisions?	Discussion held that banks normally have no right to access real property until foreclosure. Access to the property is necessary to perform the pre-acquisition and acquisition inspection	The subcommittee's consensus was that the date of the acquisition of real property is the date when the sheriff records the deed granting title to the lender. For foreclosures, DNR

		considers the title acquisition date to be the day the judge signs the court order confirming the sheriff's sale, which is stated in DNR guidance RR-508. Is further clarification needed?
Is clarification needed to outline the obligations of a lender at properties where there is a continuing obligation for purposes of maintaining the exemption? For example, does a lender need to operate a mitigation system for vapor intrusion?		DNR raised as a concern
Application of lender liability exemption to lending activities for farms	There is a distinction between personal property and real property – should this be clarified for purposes of Wis. Stat. § 292.21 ( <i>See</i> Wis. Stat. §§ 990.01(27) (“personal property”), (31) (“property” includes real and personal property) and (35) (“real property”))?	Should this be clarified?
Do Wis. Stat. § 292.21 lender exemptions transfer to another lender in the context of a merger between the lender that obtained the exemption and the merging lender?		DNR is evaluation the transferability of the lender exemptions in this context.
Is a bankruptcy trustee included under the definition of “representative” in Wis. Stat. § 292.01(16) for purposes of the exemptions in Wis. Stat. § 292.21(2)?	Discussion held that while bankruptcy trustees are court-appointed, it is unclear by the specific terms of the definition of “representative” whether a bankruptcy trustee is covered	Clarification requested by subcommittee

<p>With respect to trustees and receivers, is clarification needed to explain the distinction between Wis. Stat. § 292.21(1), which does not address properties in possession or control of trustees or receivers, versus the provisions within Wis. Stat. § 292.21(2), which address representatives of personal or real property?</p>	<p>Discussion held that because a trustee or receiver is not a “lender,” it is not covered under the exemptions in Wis. Stat. § 292.21(1); however, the trustee or receiver would be covered under Wis. Stat. 292.21(2) for personal liability. Are trustees and receivers aware of this distinction?</p> <p>Discussion that DNR’s position has been that DNR expects a business in receivership to continue cleanup efforts.</p>	<p>Is guidance necessary to clarify the applicability of the lender exemptions to trustees and receivers?</p>
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